Unchecked and Unbalanced?

The Politics and Policy of US Nuclear Launch Authority

Should the United States system of nuclear launch authority be revised to allow greater collective input to decision-making? Recent legislative proposals and media commentary have argued that US nuclear statecraft would benefit from reform of command and control: either a reassertion of congressional authority to approve the first-use of nuclear weapons or the co-participation of additional actors within the executive branch in the launch process. Strengthening such safeguards would, it is claimed, leave presidential command intact to respond to an attack on the US but guard against an out-of-control Commander-in-Chief initiating an irrational or illegal nuclear war. If the unthinkable had to occur, the president would no longer be unchecked and unbalanced.

The current centralized system is a glaring exception to the US Constitution's intricate order of fragmented authority and multiple veto points. No more striking a contrast to the Framers' suspicion of concentrated power exists. But this article argues that profound caution should nonetheless accompany consideration of legislative changes whose constitutionality is heavily contested and strategic value is at best unclear. At a moment of extraordinary partisan polarization at home and deepening geo-political tension in the poly-nuclear order abroad, injecting greater procedural uncertainty into the decision-making process seems as strategically unwise as it is politically untimely. If reform should occur to address the inherent risks in unfettered presidential discretion, alterations involving Congress represent the worst options. Requiring intra-executive concurrence in launch decisions offers more modest but important improvements on the existing design.

In balancing strategic necessity, constitutional authority, military efficiency and legislative oversight, the unique properties of nuclear weapons caution strongly against heavily constraining presidential autonomy over launch decisions. The US is a nation of laws, but it is first a nation. As such, the relative merits of presidential decision-making for the nation's safety are a concern *of* constitutional dignity rather than a concern to be weighed *against* the Constitution. But even if constitutional objections to legislative control are not dispositive, and the argument rests primarily on its policy merits, serious problems confront Congress exercising co-responsibility for nuclear decisions. There exist no means that are both constitutional and practical by which Congress can feasibly share first-use decisions with the president.

That, however, leaves the status quo in tension with core constitutional values. In rejecting monarchical models, the Framers rejected the notion that a single individual should possess exclusive authority to initiate war.[1] Executive concurrence would instead provide serious but not intrusive checks, leaving presidential authority intact and preserving the credibility of US deterrence while protecting the military from evaluating the legality of launch orders. The governance of nuclear weapons would benefit from such an important, if

[1] An exception to the broad consensus on this point is John Yoo, *The Powers of War and Peace: The Constitution and Foreign Affairs After 9/11* (Chicago: University of Chicago Press, 2005).

modest, reform that applies the spirit of the Constitution and limited government to the ultimate presidential power.

In making this case, the article revisits and updates discussion of launch authority. An otherwise voluminous literature on war powers devotes minimal attention to the topic, while the most recent scholarship on first-use dates from the 1980s.[2] Even the National War Powers Commission report of 2008 – chaired by James Baker and Warren Christopher – did not mention nuclear war or weapons in seventy-two pages of analysis and recommendations.[3] The discussion here proceeds from three assumptions: first, global nuclear disarmament is not a serious medium term prospect; second, the potential for limited nuclear war – especially, adversary nuclear escalation during a conventional conflict - represents a serious challenge to the US[4]; and third, pressure to curb presidential discretion is likely to remain part of an increasingly polarized foreign and national security policy-making environment, especially in conditions of divided government where a Republican White House faces a Democratic House and/or Senate.

Four options for organizing launch authority have generated support:

i. *Prohibition*. Congress passes legislation prohibiting outright the first use of nuclear weapons as US policy.
ii. *Conditionality*. Congress passes legislation mandating prior legislative authorization for the offensive use of nuclear weapons.
iii. *Unilateralism*. The president remains empowered to use nuclear weapons as he judges necessary.
iv. *Concurrence*. The president is required to obtain concurrent authorization within the executive branch to deploy nuclear weapons.

Although each poses serious strategic, constitutional, legal and political dilemmas, option (iv) is least problematic. After briefly reviewing US launch authority and the constitutional context, each option is considered in turn.

Presidents, the Bomb and Launch Authority

A comparative continuum of nuclear decision-making authority exists, ranging from the highly centralized to the collective.[5] The US inhabits one extreme: the president has the sole

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[2] Peter Raven-Hansen (ed.), *First Use of Nuclear Weapons: Under the Constitution, Who Decides?* (Westport, CT: Greenwood Press, 1987).
[3] *National War Powers Commission Report* (Miller Center of Public Affairs, University of Virginia, 2008) http://web1.millercenter.org/reports/warpowers/report.pdf
[4] Jeffrey A. Larsen and Kerry M. Kartchner (eds.), *On Limited Nuclear War in the 21st Century* (Stanford, CA: Stanford University Press, 2014).
[5] Eryn MacDonald, "Whose Finger Is on the Button? Nuclear Launch Authority in the United States and Other Nations," Union of Concerned Scientists Issue Brief, October 30, 2017; Avner Cohen and Brandon Mok, "Nuclear Governance and Legislation in Four Nuclear-Armed Democracies: A Comparative Study," 2017, Middlebury Institute for International Studies at Monterey http://www.nonproliferation.org/wp-content/uploads/2017/09/nuclear-governance-and-legislation-in-four-nuclear-armed-democracies.pdf accessed August 8, 2018.

legal authority to order the use of nuclear weapons, for any reason and at any time.[6] The UK, France and North Korea also have highly centralized systems. China, Israel, India, and Pakistan have adopted more collective forms of decision-making. Russia seems to exist midway between these positions, though identifying who exactly has authority is difficult. In principle, then, there exist alternatives to the current US system. Integral to any judgement about the merits of change, however, are the constitutional context and strategic environment that future US decision-makers are likely to face. Any alteration to launch authority implicates not only legal and constitutional but strategic and tactical issues that cannot easily be disentangled.

To critics, this ultimate presidential power is the most extreme example of a trend of congressional acquiescence and judicial sanction expanding the national security state beyond constitutional boundaries.[7] Since Donald Trump's election as 45th president, concern about this awesome responsibility has increased, especially – though not exclusively – among Democrats. Legislation introduced in the 115th Congress (2017-19) by Senator Edward Markey (D-MA) and Representative Ted Lieu (D-CA) sought to restrict presidential authority to order a "first-use nuclear strike" by making this subject to a prior declaration of war that specifically authorized the deployment. In November 2017, the Senate Foreign Relations Committee, chaired by Bob Corker (R-TN), held the first hearings on launch authority by Congress since 1976. Op-eds also echoed the warning of former Defense Secretary, William Perry, that "a decision that momentous for all of civilization should have the kinds of checks and balances on Executive powers called for by our Constitution."[8]

Historic concern over missing checks and balances has been episodic, associated with periods of heightened international tensions or presidents perceived as bellicose. In 1972, Senator William Fulbright (D-AK) proposed an amendment to the pending War Powers Resolution (WPR) – rejected by 68-10 - that would have prohibited the president from ordering first-use of nuclear weapons without prior congressional approval or a declaration of war. During Ronald Reagan's presidency (1981-1989), legal and scientific authorities deemed offensive nuclear war illegal or unconstitutional.[9] The most recent legislation is notable in winning greater congressional support – the Markey-Lieu bill attracted 81 co-sponsors in the House (80 Democrats, one Republican) and thirteen in the Senate (12 Democrats, one Independent) – and approval from former public officials, the *New York Times* editorial board and non-proliferation advocacy groups.

While details of the launch process are classified, it allows rapid deployment.[10] The president is accompanied by a military officer carrying the "football," a satchel containing multiple strike options and relevant codes for communicating with the chain of command to

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[6] The technical process for the launch of nuclear weapons is detailed in Amy F. Woolf, *Defense Primer: Command and Control of Nuclear Forces* CRS in Focus IF10521, December 1, 2016.

[7] Louis Fisher, *Supreme Court Expansion of Presidential Power: Unconstitutional Leanings* (Lawrence, KS: University Press of Kansas, 2017); Garry Wills, *Bomb Power: The Modern Presidency and The National Security State* (New York: Penguin Books, 2010).

[8] https://lieu.house.gov/media-center/press-releases/congressman-lieu-senator-markey-introduce-restricting-first-use-0

[9] Raven-Hansen, *ibid*.

[10] Woolf, *ibid*.

confirm an authentic order. Prior to issuing the order, the president is expected but not required to confer in person or over a secure line with senior military and civilian advisers. Neither the Defense Secretary nor Attorney General has a formal role in authorization and can be bypassed. Neither they nor Congress may overrule a launch decision. Once issued, an order reaches officers at the missile silos, bombers and submarines responsible for executing an attack. While executing a launch requires at least two military officers, the order is the responsibility of one individual alone. As Vice-President Cheney stated:

> The President of the United States now for fifty years is followed at all times, twenty-four hours a day, by a military aid carrying a football that contains the nuclear codes that he would use, and be authorized to use, in an event of a nuclear attack on the United States. He could launch the kind of devastating attack the world has never seen. He doesn't have to check with anybody, he doesn't have to call Congress, he doesn't have to check with the courts.[11]

Ambiguity surrounds the resolution of two key aspects in tension: first, military officials are obligated to refuse to obey an illegal order; and second, if anyone in the chain of command obstructs a nuclear launch order, the president can fire them (the extent of pre-delegation also remains unclear[12]).

The necessity for presidents to consider preventive or pre-emptive actions was opened by the nuclear age:

> No longer could a president easily argue, as had Franklin D. Roosevelt on the morning of December 7 after seeing diplomatic cables suggesting an imminent Japanese attack, that the United States as a peace-loving country could not attack Japan but would have to await an attack."[13]

The evolution of war making decisions, unique features of nuclear weapons, and their strategic role in deterrence of nuclear and conventional war during the Cold War pushed Congress to the margins to produce this extraordinary concentration of decision-making power.

Nuclear War Powers: Who Chooses Whose Weapons, and When?

Even as Congress has ebbed and flowed in terms of its assertiveness on national security policy, it has mostly left nuclear strategy to the executive branch. Even so, the early Cold War deference of Congress to administrations on regulating nuclear matters ended with the fracturing of consensus in the Vietnam War.[14] Thereafter Congress became much more active in constraining the antiballistic missile program of the Nixon administration, the B-1 bomber and MX missile programs, Reagan's Strategic Defense Initiative (SDI), and ballistic missile

[11] Quoted in Wills, *ibid*., pp. 3-4.
[12] Daniel Ellsberg, *The Doomsday Machine: Confessions of a Nuclear War Planner* (New York: Bloomsbury, 2017).
[13] Kenneth B. Moss, *Undeclared War and the Future of US Foreign Policy* (Baltimore, MD: Johns Hopkins University Press, 2008), p. 153.
[14] James M. Lindsay, *Congress and Nuclear Weapons* (Baltimore, MD: The Johns Hopkins University Press, 1991).

defense programs. Congress also exercised its treaty power, refusing to ratify the Comprehensive Test Ban Treaty in 1999 but approving New START in 2010. It used authorizing and funding powers under Bill Clinton to terminate funding for low-yield "mini-nukes," Safeguard C (a program to conduct atmospheric tests of nuclear weapons), and construction of a Ground Wave Emergency Network of communication relay stations. Congress also refused to fund research on a "Robust Nuclear Earth Penetrator" during the George W. Bush administration. Nonetheless, Congress consistently refrained from formally asserting control over the decision-making process on nuclear war.

Even opponents of the existing system typically concur that presidents are within their Article II constitutional authority to respond to attacks on the US without prior congressional authorization, including nuclear retaliation.[15] The focus of the discussion for reform of launch authority is therefore, to employ Peter Feaver's distinction, not situations where "the military wakes up the president" but where "the president wakes up the military"[16]: offensive war. Does restrictive legislation therefore infringe the president's Article II Commander-in-Chief authority? And is there a distinction between defensive and offensive nuclear war that parallels conventional wars, precluding prior restrictions on retaliation but permitting those on anticipatory defence?

Consensus here is elusive. While Congress possesses undeniable authority to regulate the acquisition, quantity and types of weapons available to the president as Commander-in-Chief, its authority to delimit the weapons then to be used is much more problematic. If Congress decides not to fund the purchase or research of certain weapons – as it has periodically done with low-yield nuclear devices – this is entirely within its constitutional authority. But to direct the president in terms of his choice of existing weapons is not clearly within the legislature's remit. (Equally, an administration that did declare a no-first-use policy could not be compelled to order such use by Congress.) Such legislative restrictions would appear to infringe Article II: "[t]he President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States." But others contend that, under Article I, Section VIII, Congress has complete power over the military and the president's command authority operates only where Congress has *not* provided specific direction.[17] Congress can therefore prohibit use of nuclear arms absent prior legislative permission and impose rules governing the circumstances wherein nuclear weapons are permissibly used.

History provides some guidance here. The 1787 convention changed the draft power of Congress from "make" to "declare" war, drawing a distinction between legislative (initiation and general rules) and executive (directive command of operations) functions. Initiating war is formally for Congress but making war – including decisions on the means for its conduct – remains an executive function. Implicitly, by funding those nuclear weapons in the US arsenal and not restricting presidential autonomy on nuclear decisions, Congress has conceded that nuclear arms are another war-waging instrument. Can Congress therefore

[15] Louis Fisher is a notable exception.
[16] Testimony to the Senate Foreign Relations Committee, November 14, 2017.
[17] Saikrishna B. Prakash, *Imperial from the Beginning: The Constitution of the Original Executive* (New Haven, CT: Yale University Press, 2015).

direct how the President exercises command by requiring or prohibiting certain military actions involving nukes?

Congress has authority to "make Rules for the Government and Regulation of the land and naval Forces." Nothing requires these rules to coincide with presidential preferences, though presidents can use their veto power to resist them. The power to declare war includes the power to establish wartime goals and limit a war's scope.[18] Enumeration of specific military powers, however, does not imply that Congress has plenary directive authority over operations. Under the Articles of Confederation, Congress possessed plenary powers of "making rules for the government and regulation of the said land and naval forces, *and of directing their operations* [emphasis added]." Yet in 1787 the Framers deliberately omitted the latter clause whilst retaining the former in Article I Section VIII. This strongly implies that the power to "direct (military) operations" is the president's alone. Since Congress possesses only specific powers, military matters not within these are necessarily the exclusive province of the Commander-in-Chief and, of these, the most prominent is "directing operations."

If so, in purely constitutional terms, the defensive versus offensive nuclear war division represents something of a distinction without a difference. While Congress could claim "no-first-use" means the military has not been "called into the actual service" of the US, and hence presidential operational autonomy is not encroached upon, this is problematic. All administrations have rejected a declaratory "no first-use" policy, because of the strategic role of first-use in deterrence as part of an escalation ladder. In this regard, legislative restrictions could infringe the directive authority of a president in a potential conflict, even if this was non-nuclear in character, by denying him full operational control of the US arsenal:

> Although it seems well within Congress's constitutional authority to end the production of nuclear weapons through, for example, the power of the purse, there is no clear answer on whether legislation limiting the President's power to employ those nuclear weapons that are already in the military arsenal would violate separation of powers principles.[19]

Hard cases invariably make for bad law. Reform proponents typically emphasize that the Cold War context is over, while modern communications technology and the limited likelihood of first-use scenarios together allow greater time for deliberation. But this neglects two related elements. First, geo-political tensions are re-creating multiple limited war scenarios, accentuated by AI, cyber capabilities and the comparable power of some conventional weapons to nuclear ones. Second, the animating problem with restricting presidential decision-making in offensive war is not primarily timing (as would be the case with retaliatory launches) but legitimate authority and the strategic consequences of deadlock or dissent for the credibility of deterrence threats or military actions. As such, the debate must turn heavily on the policy merits of competing options.

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[18] Louis Henkin, *Foreign Affairs and the US Constitution* (New York: Oxford University Press, 2002) 2nd edn., p. 76.
[19] Stephen P. Mulligan, "Legislation Limiting the President's Power to Use Nuclear Weapons: Separation of Powers Implications," Congressional Research Service Memorandum, November 3, 2017.

Prohibition: No First Use Legislation

In 2016, Democratic lawmakers asked the Obama administration to adopt a pledge never to use nuclear weapons first against a nuclear-armed adversary.[20] The utility of such a blanket prohibition arguably lies in its strategic clarity. Other nuclear states, such as India, have publicly made no-first-use declarations. Supporters claim that such statements affirm that nuclear weapons are defensive, not tools of aggression, and thereby help to decrease international tensions and assist efforts towards non-proliferation.[21] Some have also argued that first-use would not conform to the Law of Armed Conflict in terms of legality and proportionality. Legislative prohibition – which would require supermajorities to overcome a veto - would preclude the president from legally ordering the use of nuclear weapons in anything other than retaliation for an attack on the US (and in the case of the Markey-Lieu bill, only a nuclear, not a non-nuclear attack that might involve cyber, chemical or biological weapons). Presidents would be required, under Article II, to "take Care that the Laws be faithfully executed" by adhering to its provisions:

> a blanket prohibition on the first use of nuclear weapons is constitutionally unobjectionable. Although the prohibition does affect the commander in chief's ability to engage in military activities by refusing to grant him plenary power over a particular weapon system, it does not invade the President's constitutional prerogative to conduct war within the confines of the military apparatus created by Congress.[22]

Even if one accepts that a blanket prohibition would be legal and constitutional, however, there are strong reasons for rejection. Positive public relations aside, in strategic terms, whether no-first-use declarations have substantive as well as symbolic utility can reasonably be doubted: "Much more wisdom comes from watching what countries do than from listening to what their leaders say, since the latter is often primarily designed for domestic audiences."[23] There seems minimal reason for optimism that the destructive quantity and quality of nuclear weapons will be on anything other than an upward trajectory. The number of nuclear states is relatively stable, but this may change if more states acquire nuclear capability, not least if North Korea continues to dissemble on denuclearization and Iran resumes its nuclear program. The growing popularity of nuclear energy enables several states to retain this option. The possible contingencies in which first-use is a necessary option for Washington is hence likely to grow rather than diminish. Rather than future-proofing the US through outright bans, strategic prudence surely demands that the government possess maximum flexibility.

Beyond this, US and NATO strategic doctrine has rested on the first-use option, originally to counter the Soviet Union's conventional superiority, latterly to address the

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[20] Letter from Honorable Barbara Lee, *et al*. to President Barack Obama (October 13, 2016), http://lee.creative.house.gov/download/letter-to-president-obama-on-nuclear-no-first-use-policy..

[21] Cynthia Lazaroff, "Dawn of a New Armageddon," Bulletin of Atomic Scientists August 6, 2018, https://thebulletin.org/2018/08/dawn-of-a-new-armageddon/, accessed August 8, 2018.

[22] Allan Ides, "Congressional Authority to Regulate the Use of Nuclear Weapons," in Raven-Hansen, *ibid*., pp. 82-83.

[23] Christopher J. Fettweis, *Psychology of a Superpower: Security and Dominance in U.S. Foreign Policy* (New York: Columbia University Press, 2018), p. 57.

potential threats of Russia to Europe, and China and North Korea to East Asia. Maintaining a first-use option has a dual purpose, to deter adversaries and reassure allies. Although a selective proliferation scenario might eventually see Washington encourage some allies to acquire their own nuclear deterrents, this remains distant.[24] Abandoning the first-use option would erode deterrence and disturb allies, potentially contributing to the proliferation that no-first-use proponents claim to oppose.

Partly for this reason, the Obama administration rejected pleas to adopt such a declaration. A close reading of its 2010 Nuclear Posture Review suggested that the administration reserved the right to use nuclear weapons against even NPT member states that were "not in compliance" with their treaty obligations. That an avowedly abolitionist administration should reject no first-use is especially instructive. No consensus exists for taking first-use off the table. Moreover, Russian military doctrine now treats the use of tactical nuclear weapons to "escalate to de-escalate" as the norm. As Moscow and Beijing modernize their nuclear arsenals and adapt their doctrines, the Nuclear Posture Review of 2017 called for the US also to again examine the utility of low-yield weapons in tailored deterrence. In a fluid post-MAD environment, a sound strategic response would seem to demand an agile US flexibility to deal with the multiple contingencies of a multi-polar nuclear world, not excessive restrictions.

Conditionality: Legislative Authorization

Following the Obama administration's rejection, Trump's presidency encouraged no-first-use advocates to advance a legislative strategy as the second-best option for opponents of offensive war. To supporters, the restrictive legislation balances strategic necessity – eschewing a blanket ban – with constitutional propriety, offering a necessary and timely injection of legislative control to the decision-making process. Proponents claims that it would subject the ultimate power to the checks and balances that otherwise exist on presidents, while leaving undisturbed the retaliatory capacity of the president to respond to actual or imminent attacks.

Unfortunately, the suggestion replicates all the problems associated with conventional war authorizations while adding much greater risk. In constitutional terms, the legislation sponsored in the 115th Congress was triply problematic.

First, it would not allow the president to respond with a second strike to a non-nuclear attack on the US, however devastating. Even a formal declaration of war – last made in 1942 - would be insufficient to allow the Commander-in-Chief discretion to use nuclear weapons, since this required a specific authorization even in a declaration.

Second, such restrictions would again raise important questions regarding the legislature's infringing the operational command of the president. To offer a concrete example, in the 1991 Gulf War, James Baker delivered a clear warning to the Iraqis that Washington reserved the right to respond to any use of chemical or biological weapons with a

[24] Hal Brands, *Dealing With Allies In Decline: Alliance Management and U.S. Strategy in an Era of Global Power Shifts* (Washington, DC: Center for Strategic and Budgetary Assessments, 2017).

nuclear response. While analysts disagree over its deterrent effectiveness– and nuclear weapons use had been ruled out privately in advance[25] – the president would be unable to credibly make or execute such a threat without prior, open authorization by Congress.

Third, whether such a no-first-use law passes constitutional muster is unclear at best. On the one hand, invoking Justice Robert Jackson's influential tripartite formulation, the president is constitutionally weakest when he is acting contrary to a law passed by Congress.[26] On the other, the federal judiciary has a mixed record when it comes to questions of presidential power, the separation of powers and foreign affairs, with a particularly long history of refusing to adjudicate war powers conflicts. Moreover, in *Zivotofsky v Kerry* (2015), the Supreme Court was quite clear about limits on congressional authority and even "liberal" Justices such as Elena Kagan have tended to take a permissive view of executive power. As Fisher notes with deep regret, judicial support for independent presidential authority has been especially pronounced in "the field of external affairs, including the war power, treaty negotiation and termination, the state secrets privilege, the power to recognize foreign governments, and the broad area of national security policy."[27]

Whatever the constitutional position, in policy terms the arguments for legislative restriction of presidential discretion suffer from important flaws. Most notably, Congress is notoriously poor in terms of mobilizing collective action, and the dangers of stasis occurring on a matter as grave as nuclear warfare multiply the existing risks. As the multi-year struggle to pass a new Authorization for the Use of Military Force to replace the 2001 AUMF illustrates with pellucid clarity, the inter-branch imbalance over conventional war reflects a failure not of the Constitution but congressional will.[28] Not only does partisan polarization increasingly constitute a national security problem but the potential for crisis amid legislative deadlock – a House that authorizes nuclear war and Senate that refuses to do so, or vice versa – is very real. While some argue that the special challenges of nuclear decisions justify giving Congress some authority to regulate them, the record of legislative oversight has been patchy.[29] Congress, according to its own senior staff, is ill-equipped to discharge its existing responsibilities.[30] Finally, the costs of a divisive, contentious and highly partisan debate to US deterrence are potentially devastating. Any rational international adversary would be likely to take precipitate action rather than patiently awaiting the outcome of legislative deliberation by lawmakers who appear less eager to assume genuine co-responsibility for military actions than to transfer risk to chief executives.

What is additionally problematic for Congress is the WPR, which provides presidents with the legal authority to initiate hostilities for ninety days. Contrary to claims about the

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[25] James A. Baker, *The Politics of Diplomacy: Revolution, War and Peace 1989-1992* (New York: Perigee, 1995), p. 359.
[26] *Youngstown Sheet and Tube Co*. v *Sawyer* 343 U.S. 579 (1952).
[27] Fisher, *ibid*., p. xi.
[28] Sarah Burns, "Debating War Powers: Battles in the Clinton and Obama Administrations," *Political Science Quarterly* 132 (2) 2017, pp. 203-223.
[29] Fowler, Linda L. (2015). *Watchdogs On The Hill: The Decline of Congressional Oversight of U.S. Foreign Relations* (Princeton, NJ: Princeton University Press).

[30] *State of the Congress: Staff Perspectives on Institutional Capacity in the House and Senate* (Washington, DC: Congressional Management Foundation, 2017).

growing willingness of presidents to assert "inherent" constitutional powers to justify an ever more expansive role in national security policy, "in our post-Cold War era, even the most 'forward-leaning' examples of presidential assertion generally come in the form of aggressive interpretation of statutes rather than of the Constitution itself."[31] The WPR is a case in point. It certainly provides no clarification, much less a prohibition, on the weapons to be employed. As such, it technically appears to accord the presidency the statutory right to legally use even nuclear force without prior congressional approval. Presidents have contested and rejected the WPR's constitutionality – especially Section 2(c)[32] - and, mostly, disregarded its limitations. In this instance, though, Congress would be hoist with its own petard. Presidents could point to the grant of legal authority as clear and unlimited or, as with conventional uses of force, declare themselves to have acted "consistent with" if not "pursuant to" the WPR. Unless Congress sought to use "negative" power, by enacting a statute specifically prohibiting use of nuclear weapons in each conflict, then no-first-use legislation would conflict with a prior statutory provision enabling first-use.

Such legislation resembles a "legislative veto" which, though it survived, was ruled unconstitutional in *INS* v. *Chadha* (1983).[33] As the National War Powers Commission noted, "The general view is that if the War Powers Resolution were put to the same test in *Chadha*, Section 5(c) of the Resolution, and perhaps other provisions, would fail."[34] Whether a judicial challenge would continue the long tradition of judicial reticence to intervene on a "political question" is unclear. Perhaps more pertinent is whether presidents would simply flout its provisions and Congress not act to secure executive compliance through new legislation, the power of the purse, or impeachment. Politically, as the next section details, nuclear weapons use would be potentially less damaging to presidential careers than commonly imagined.

Congress, in sum, has ample constitutional authority to establish a new legal regime regulating launch authority. But whether this regime would be constitutional and effective is an altogether more contentious question. Legislative deficiencies augur badly for a positive congressional contribution to the decision-making process. Deterrence is unlike trade promotion authority, where executive branch negotiations of deals are then subject to a congressional up-or-down approval. Deterrence relies on credible threats being implemented. Conditionality would undercut the credibility of any administration making threats. Partisanship has always influenced the "invitation to struggle" over foreign policy but making a political football of the nuclear football seems unwise. Given the "perils" that partisan polarization already poses to national security, adding even greater risk by exposing nuclear decision-making to polarized politics appears imprudent.[35] A greater input is unlikely to make Congress a "net provider" of US nuclear security.

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[31] Andrew Kent and Julian Davis Mortenson, "Executive Power and National Security Power," in Karen Orren and John W. Compton (eds.), *The Cambridge Companion to the United States Constitution* (New York: Cambridge University Press, 2018), p. 283.
[32] This states that a president may exercise his powers as Commander-in-Chief "only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by an attack upon the United States."
[33] *INS* v. *Chadha* 462 U.S. 919 (1983).
[34] *National War Powers Commission Report* p. 23.
[35] Kenneth A. Schultz, "Perils of Polarization for US Foreign Policy," *The Washington Quarterly* 40 (4) 2017, pp. 7-28

Presidential Unilateralism

It might be argued that the status quo remains the simplest method of organizing launch authority. First, surveying the post-1945 history of the "nuclear taboo," only the most jaundiced observers can contend that presidents were reckless warmongers apt to initiate nuclear war on a whim. Second, the presidency is not so much unrestrained and lawless as preoccupied by multiple legal constraints: unprecedentedly powerful but also unprecedentedly accountable.[36] Third, Congress can and does use multiple avenues to articulate opposition to "presidential wars" and influence administration calculations.[37] But as Posner and Vermeule note, the political costs as much as legal constraints facing chief executives are crucial.[38] Fourth, perhaps the most instructive aspect of recent congressional activity on nuclear matters is that policymakers have – for now, at least - rejected substantial regulatory change. Restrictive no first-use legislation did not secure co-sponsorship of most House or Senate Democrats or even come to a vote in either chamber over 2017-19. Nor, following its oversight hearings, did the Senate Foreign Relations Committee undertake further legislative action. In the balance of risk and reward between restricting a president and emboldening an international adversary, most lawmakers have apparently concluded that the cost of reform outweighs the possible benefits.

But none of this relative inertia should induce complacency. The status quo remains deeply problematic. At the Senate hearings in November 2017, responding to a question about whether the president could ignore a military lawyer's advice that a launch order was illegal, the answer offered by the former head of US Strategic Command, General Robert Kehler – this would present a "very interesting constitutional situation"[39]– illustrated the opacity of what would occur if a president acted irrationally or against the law. The ultimate recourse to a president acting illegally but no doubt, in his view, morally and legitimately is either removal via the 25th Amendment or impeachment for "high crimes and misdemeanors." Neither offers a reliable check on a "rogue" president or dubious launch order.

Faced with a security crisis of such magnitude that first-use was seriously contemplated in the White House, a president may not feel fatally constrained by the absence of congressional permission. A future president might well echo George H. W. Bush's claim that, "I didn't have to get permission from some old goat in the United States Congress to kick Saddam Hussein out of Kuwait"[40] If the primary purpose of legal constraints is to raise

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[36] Jack Goldsmith, *Power and Constraint: The Accountable Presidency After 9/11* (New York: W.W. Norton, 2012).

[37] William G. Howell and Jon C. Pevehouse, *While Dangers Gather: congressional checks on presidential war powers* (Princeton, NJ: Princeton University Press, 2007); Douglas L. Kriner, *After The Rubicon: Congress, Presidents, and the Politics of Waging War* (Chicago: University of Chicago Press, 2010).

[38] Eric A. Posner and Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic* (New York: Oxford University Press, 2013).

[39] Testimony to the Senate Foreign Relations Committee, November 14, 2017.

[40] President George H.W. Bush, remarks at the Texas State Republican Convention, Dallas, Texas, June 20, 1992 at http://www.presidency.ucsb.edu/ws/?pid=21125.

the political price paid for their violation, this is improbable - but possible. The handful of nations against which it is currently possible to imagine such a strike occurring – North Korea, Iran, Russia, China, Pakistan - invariably register low in "thermometer" ratings of American affections.[41] The use of nuclear weapons against a hostile power would also likely occur after a campaign by the White House to frame the reasons for action. Shocking though the end of non-use might be, it would probably not come as a total shock. Moreover, there is no guarantee that even illegal use might forfeit public support. Replaying the 1945 example of a Truman-esque trade-off between using nuclear weapons on an enemy and causing mass civilian deaths or losing substantial numbers of US troops in a conventional war, Sagan and Valentino – applying the trade-off to a hypothetical case involving Iran - found most Americans preferring the nuclear option and disregarding the non-combatant immunity norm: "Contrary to the nuclear taboo thesis, a majority of Americans are willing to support the use of a nuclear weapon against an Iranian city killing 100,000 civilians."[42]

Under such conditions, the prospect of the Cabinet recommending, and Congress supporting, removal is remote, and presidents could plausibly relegate the prospect of impeachment to a second or third-order concern (assuming the president and the US survive). In today's febrile partisan environment, especially, it seems highly unlikely that a crisis measure taken in good faith by the Commander-in-Chief would meet with universal public disapproval. The president's failure to fulfil his oath "to take care that the laws be faithfully executed" would not automatically result in impeachment - an abuse of power in violation of the nation's best interests. Politically, it would also be unlikely that a party could easily secure both a majority in the House for articles of impeachment and a two-thirds supermajority in the Senate to convict. In short, checks and balances are not locks and bolts. Presidents using nuclear weapons in a first-strike capacity may have little to fear politically for the consequences even of illegal and unconstitutional actions. (The greater concern over impeachment could conceivably stem not from excess zeal about military action but, as Kennedy feared during October 1962, excess caution.)

Although states can "learn" from their experience with nuclear weapons, moderating behaviour over time, even long-standing nuclear powers remain exposed to the vagaries and vicissitudes of their individual leaders.[43] Leaders with direct military experience are less likely to authorize the use of military force than those with military but no combat experience.[44] A more discriminating US (s)electorate might conceivably take notice of that. But maintaining the status quo leaves the nation subject to a single individual's preferences. However responsible presidents have been thus far, that exposure is impossible to reconcile with the manifest intent and design of the US Constitution and the wider political culture.

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[41] Jim Norman, "Four Nations Top U.S. Greatest Enemies' List," Gallup February 22, 2016, http://www.gallup.com/poll/189503/four-nations-top-greatest-enemy-list.aspx?g_source=greatest+enemies&g_medium=search&g_campaign=tiles

[42] Scott D. Sagan and Benjamin A. Valentino, "Revisiting Hiroshima in Iran: What Americans Really Think About Using Nuclear Weapons and Killing Non-Combatants," *International Security* 42 (1) 2017, pp. 41-79 at 79.

[43] Michael D. Cohen, *When Proliferation Causes Peace: The Psychology of Nuclear Crisis* (Washington, DC: Georgetown University Press, 2017).

[44] Michael C. Horowitz and Allan C. Stam, "How Prior Military Experience Influences the Future Militarized Behavior of Leaders," *International Organization* 68 (3) 2014, pp. 527-59.

Concurrence: Intra-Executive Concurrence

The most modest but serious alternative is to mandate co-authorization within the executive branch. This avoids the multiple problems involving legislative co-decision while ensuring that the president cannot order the illegal use of nuclear weapons. While the decision to order a launch would remain the president's, by requiring the concurrence of the Defense Secretary and Attorney General, an element of co-responsibility is introduced.[45] The former would confirm the order's validity, as originating from the Commander-in-Chief, and the latter would confirm its legality. This reform could be achieved either by executive order or through a new law passed by Congress.

It is mildly ironic that concern about unwise or inappropriate use of the nuclear arsenal has evolved from errant generals making unauthorized launches during the Cold War – the mainstay of *Dr Strangelove* and *Fail Safe* - to impetuous or careless presidents in the post-Cold War era.[46] But sharing responsibility for the terrible decision to use nuclear weapons may even appeal to presidents who otherwise bear the awesome responsibility entirely alone. Concurrence offers a double security in offering political and legal cover to presidents for their decision while protecting the uniformed military from having to make legal calls about a presidential order. In that regard, it offers meaningful protections against insufficient deliberation and military insubordination while preserving the key strategic benefits of presidential command and control.

The proposal is, nonetheless, not without its own problems.

In constitutional terms, only the president possesses authority to act as Commander-in-Chief. He cannot delegate authority to others, whether within the executive or – as some recommended in the 1980s – to a special committee of senior members of Congress. Although presidents have delegated authority down the military command, this is distinct from civilian control. Requiring the president to obtain concurrence before launching a military strike could be seen as unconstitutionally undermining the Commander-in-Chief role at the apex of the US military. Moreover, such a law could be viewed as intruding upon the president's authority to "speak for the Nation with one voice" on foreign relations. Against this, however, the Defense Secretary here is envisaged as authenticating the source of the order rather than "approving" it, and the Attorney General as affirming its legality – neither are exercising co-decisional authority as such. Their concurrence may even confirm a presidential decision as authentic and legal that both nonetheless view as unwise.

In operational terms, to the extent that the most likely decisions involving offensive use of weapons are likely to comprise limited wars, these may also be precisely the kinds of cases where the potential for intra-branch disagreement is greatest. In terms of costs, though, introducing a minor delay in the launch decision for such an offensive nuclear war seems unproblematic. Necessary secrecy would still be maintained, unlike the option of going to Congress. Technology also means that it should be straightforward to communicate with the two officials, whatever their location. This would not seem to give the enemy an advantage in

[45] Richard K. Betts and Matthew C. Waxman, "The President and the Bomb," *Foreign Affairs*. 97 (2) 2018, pp. 119-28.
[46] Jeffrey Lewis, *The 2020 Commission Report on the North Koran Attacks Against the United States* (London: WH Allen, 2018).

a tense stand-off or during a conventional conflict that threatened to go nuclear. Perhaps only in cases of pre-emption, where an anticipatory launch was deemed necessary to avoid an imminent attack on the US, might time be of the essence.

Perhaps the most serious objection to concurrence is that, politically, the proposal raises the possibility of deadlock between executive branch officials, with the accompanying risk of either a strategic cost or political crisis. That is, in a nascent or on-going national security crisis – presumably the only situation in which nuclear force is contemplated – the president faces the options of either backing down from his desired decision or firing the recalcitrant officials. In the latter, since the Defense Secretary and Attorney General require Senate confirmation, a national – if not a constitutional - crisis could arise. As the memoirs of multiple senior officials attest, internecine mistrust and suspicion between and within the staffs of executive branch agencies and departments is a matter of the extent, not the fact.

Again, though, while this objection has merit, it is not dispositive. Concurrence is designed precisely to raise the possibility of placing "insubordination on firmer legal footing."[47] This applies to civilian and military opposition alike. Suppose the Attorney General refused to confirm the legality of the launch order. Either the president would then be required to reverse his decision and refuse to take an action that he determined was in the national interest or he would be required to dismiss the official. In October 1973, President Nixon ordered the Attorney General, Elliott Richardson, to fire Special Watergate prosecutor Archibald Cox, but both Richardson and his deputy, William Ruckelshaus, refused and resigned. Cox was then fired by Solicitor General Robert Bork in what became known as the "Saturday Night Massacre." While Nixon won in the short-term, the crisis irreparably weakened his presidency. The potential costs to timely action and US credibility could be serious in a pending nuclear strike. But that would be the point. A political massacre would be infinitely preferable to a nuclear one. The prospect of the former would be designed to dissuade a president from taking injudicious actions that would precipitate the latter in all but the most extreme instances.

Such a system of concurrent authorization would not satisfy those who argue for the involvement of Congress. Nor could it be more than a necessary but insufficient safeguard on an irresponsible or stubborn president. A determined president might simply rescind an executive order mandating concurrence or ignore a law that is deemed unconstitutional, betting on favorable political odds to survive impeachment or removal. Concurrence might also encourage presidents to appoint personally loyal figures – hacks, relatives and so on, rather than distinguished individuals - to the relevant offices. In short, the reform might be reduced to mere window-dressing in which the "triumvirate" can be expected to ratify an irrational but – in the Attorney General's view - legal decision. Where the involvement of Congress poses serious potential problems in hindering a timely, clear and independent decision-making process, on this reading the concurrence model offers the worst of both worlds: risking political crisis while not seriously restraining presidential autonomy. Against this, it demands that Congress take its responsibilities seriously – not in assuming executive functions for which it is ill-suited but in scrutinizing nominees to the posts of Defense Secretary and Attorney General with due diligence.

[47] Betts and Waxman, *ibid*., p. 127.

Conclusion

The absence of reliable checks and balances on the president's nuclear launch authority is a function of the unique properties of nuclear weapons and the continuing necessity of "calculated ambiguity" to effective deterrence. Compromising presidential decision-making authority over nuclear weapons remains sub-optimal while such weapons exist. Rather than gambling on national security, Washington could make incremental but serious steps to shoring up US nuclear architecture: eliminating "use or lose" silo-based missiles, taking nuclear ICBMs off high-alert status, and improving command-and-control to increase warning and launch times. A re-dedication to resolving the geo-political conditions that underlie the emerging nuclear order would also assist but unilateral disarmament in the face of serious nuclear threats is senseless.[48]

In the context of declining public trust in all major institutions bar the military, it may seem quixotic to maintain such vast power in the presidency. But there exist no easy institutional "fixes" to the dilemma of command and control, contrary to those who either lionize the presidency and discern no problem or who fetishize legalism and place their trust in an inconstant and irresponsible Congress. Requiring congressional authorization is constitutionally problematic and likely to seriously diminish the effectiveness of US nuclear deterrence to adversaries and reassurance to allies. And while there is a mechanism for the exercise of democratic accountability - the quadrennial presidential election – this offers only limited purchase to decision-making. Requiring concurrence within the executive branch for initiating nuclear launches is a modest but serious improvement on the existing unsatisfactory system. The Bulletin of Atomic Scientists' "Doomsday Clock" ticked thirty seconds on, to two minutes to midnight, after January 2018. The hour for reform of nuclear launch authority has also now arrived.

[48] Brad Roberts, *The Case for US Nuclear Weapons in the 21st Century* (Stanford, CA: Stanford University Press, 2016).

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